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No. 80-239

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOLO CUP COMPANY,

Respondent,

vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(Emphasis added)

I.

Erie Was Disregarded

Respondent appears to make three answers to petitioner's contention that the court of appeals failed to follow *Erie,* Res. Br. 3: (1) the court of appeals did apply Illinois law; (2) *Erie* does not require that a federal court sitting in diversity correctly apply state law; and (3) *Erie* does not require a federal court sitting in diversity to follow decisions of the state's intermediate courts. None of these answers has merit.

First, *Ladd Construction Co.* v. *Insurance Company of North America,* 73 Ill. App. 3d 43 (3d Dist. 1979) states

Illinois law as to a casualty insurer's duty to defend suits seeking equitable relief. Under *Ladd* Federal had no duty to defend. It is apparent from the failure of the court of appeals to mention or explain its disregard of *Ladd* that that court declined to follow Illinois law.[1]

Second, it would make a nullity of *Erie* to say that a federal court is free to misapply state law or that this court has no interest in assuring the correct application of state law in diversity cases. Where clear error is charged, this court does not hesitate "to determine whether the Circuit Court of Appeals *correctly* applied" state law, *Wichita Royalty Co.* v. *City National Bank,* 306 U.S. 103, 104 (1939) for the "rights . . . reserved by the Constitution to the several states", *Erie* v. *Tompkins,* 304 U.S. 64, 80 (1938) are no less transgressed by misapplication of local law then by outright disregard of that law. Indeed, so strong is the requirement that state law be correctly applied in diversity cases that this court requires federal appellate tribunals to conform judgments under review to changes in state law which have occurred after entry of judgment by the district court. *Huddleston* v. *Dwyer,* 322 U.S. 232, 236 (1944); *Meredith* v. *Winter Haven,* 320 U.S. 228, 237 (1943); see also *Nolan* v. *Transocean Air Lines,* 365 U.S. 293 (1961).

Third, in the absence of a controlling decision by the highest court of the state, federal courts are bound to follow decisions of intermediate appellate courts of the state. *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169 (1940); *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223 (1940); *California* v. *Taylor,* 353 U.S. 553 (1957); *Jones* v. *Schellenberger,* 225 F2d 784, 790-791 (7th Cir. 1955), *cert. denied,* 350 U.S. 989 (1956), where, as here, those decisions are not in conflict with other decisions of

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[1] Notably, respondent also fails to mention *Ladd.*

the state's highest court and the federal court can point to no persuasive reason for believing the state's highest court would decide otherwise.

II.

The Decision Below Conflicts With Griggs, et al.

Respondent also errs in saying, Res. Br. 3, no interpretation (and hence no wrong interpretation) of Title VII was made by the court of appeals. To reach this conclusion respondent argues that the question of whether Title VII proscribes intentional discrimination was not addressed below but instead can be and was separated from the question of whether the policy in issue covers the discrimination alleged. That is not so. The only charge made by the underlying EEOC complaint concerns *intentional* practices under Title VII, App. 41a. If, as petitioner urges, disparate impact practices are, under the reasoning in *Griggs* and *Albermarle*, a species of *intentional* discrimination, Federal could have no duty to defend since its policy covered only *unintentional* occurrences. In holding that Federal was obligated to defend, the court of appeals necessarily held that Title VII imposes liability for unintentional discrimination. This departure from settled rulings of this court warrants review.

Respectfully submitted,

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